LA COMMISSION DE LA REFORME LEGALE DE LA NOUVELLE ECOSSE

DISCUSSION SUR L'IMPOSITION DES OBLIGATIONS DU MAINTIEN

SOMMAIRE

Dans cette discussion, la commission de la réforme légale de la Nouvelle Ecosse considère les questions de droit et de politique sociale, associées avec le problème de faire respecter les obligations légales de payer le maintien au Famille. Il y a peu d'informations statistiques sûr disponibles en Nouvelle Ecosse concernant le nombre de gens qui ne paient pas le support de leurs anciens partenaires ou de leurs enfants, ou concernant les raisons pourquoi certains ne paient pas, même quand la loi l'exige.

Selon les informations disponibles à la commission, il paraît que plusieurs bénéficiaires néo-écossais du maintien, rencontrent des problèmes à s'assurer l'argent nécessaire pour se supporter eux-même ou leurs enfants. A part des difficultés personelles entre les membres adultes de la famille qui peuvent contribuer au problème, d'autres problèmes résultent du processus légal de la collection des versements. Parce que le gouvernement de la Nouvelle Ecosse peut être requis de faire ces versements au moyen d'assistance publique pour garantir que l'argent est disponible pour les coûts de la vie, le résultat est que tous les contribuables de la Nouvelle Ecosse doivent payer les coûts qui résultent de ce problème.

La discussion contient 27 propositions recommandé pour la réforme que la commission considère. Les objectifs principaux des propositions de la commission sont:

- Classage des ordonnances - pour assurer que tous les ordonnances de maintien faites par n'importe quel cour provinciale sont classées automatiquemment et imposées au moyen d'un bureau gouvernemental (le proposé directeur d'imposition du maintien). Cela arrivera à moins que les deux parties concernées par l'ordonnance n'en consentissent autrement;

- Responsabilité du gouvernement d'imposer des lois - pour enlever la responsabilité et le coût d'imposer une obligation de maintien de la personne qui devrait recevoir l'argent et de le placer sur le bureau du directeur (soit ordonnance de la cour de payer le maintien ou une convention écrite entre les personnes entrainées);

- Réduction de délais - pour réduire les délais dans le processus d'imposition en accordant au directeur l'autorité exclusive de prendre action en imposant ses obligations de maintien sans la nécessité d'une autre audition de la cour; et

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- Application de la cour pour changement de circonstances financières - pour assurer que si le versement est raté ou retardé à cause d'un changement de conditions financières, par exemple une perte d'emploi, que la personne dont la situation est changée, est responsable d'appliquer à la cour pour faire changer le montant des versements.

La commission désir utiliser le personnel existant quand possible et veux développer des façons d'imposer qui sont rapides, efficaces et moins chers. La commission suggère une nouvelle loi pour créer le bureau de directeur de l'imposition du maintien qui imposerait automatiquemment tout maintien ordonné par les cours. Les individus qui ont fait des conventions de maintien qui ne sont pas ordonnées par les cours, auront l'abilité d'enregistrer la convention avec le bureau du directeur de l'imposition. Une fois enregistrée, une convention serait considerée comme ordonnance de la cour pour les intentions d'imposition.

Les individus faisant l'objet d'ordonnance de maintien qui désirent s'exempter du programme auront le droit de le faire si les deux parties sont en accord. La commission sollicite les opinions du publique sur plusieurs questions de politique sociale, à savoir s'il est convenable ou pas, dans certaines situations, d'empêcher des individus de quitter le programme.

La commission croit qu'une meilleure imposition des obligations du maintien est une question importante dont tous les gens de la Nouvelle Ecosse se préoccupent. Afin d'aider la commission à préparer son rapport final pour le gouvernement de la Nouvelle Ecosse, la commission sollicite les commentaires, les opinions et l'avis du publique sur les propositions discutées.

KMISN TELUEKEK IL-LUKWATMN TEPLUTAQNN WJIT NOPA SKO'SIA

Ula wi'katikn wesku'tk ta'n tli-ktmoqjenaten wen apoqnmuan wikma'jl aqq wnijanua sulieweyiktuk ela'tekemk

Ula Kmism teluekek il-lukwatmn teplutaqnn wjit Nopa Sko'sia wesku'tk ula wi'katikniktuk ta'n teli-mtue'k kisa'luksin wen apankitmn suliewey wjit wikma'jl wlo'tim aqq ma'w wnijanua. Mu pikwelknukw infrme'sn etek ta'n wji-kjijituss wen ta'n te'sit mimajuinu mu apoqnmuaqul wikma'jl sulieweyiktuk aqq ta'n koqoey wjit mu weji-apoqnmuaqul tlia' teplutaqn etek teluek miamuj apoqnmuan.

Ta'n teli-kjijitu'tij kmisnaq, mimajuinu'k ta'n nuta'ti'tij suliewey metua'lukwi'tij teli-msnmi'tij ta'n apoqnmakutaqq nekmow aqq ma'w wnijanua. Kejitasik ekel ji'nm kisna e'pit mu weji-apoqnmakukl wikma'jl sulieweyiktuk mita na't koqoey weta'mati'tij wekayiktatijik, aqq ktik staqe nike' mu tepiknanukwek teplutaqn kisa'luksin wen apankitmn. Teli-pkije'k kapmnt Nopa Sko'sia miamuj elmi-kespiaq eweketoq sulieweym kulaman apankitasitew ta'n mimajuinu'k etlqatmu'ti'tij aqq ma'w wilu'ow na na nike' staqe teluekel msit Nopa Sko'siaewaq ta'n apankitmitij tax miamuj ankui-apankitmi'tij teli-pkije'k e'pijik aqq ji'nmuk puna'l'tulti'tij mu kitu'-apoqnmatulti'kw sulieweyiktuk. Ula nike' Kmisn ankite'tkl pem-wikasikl ta'n jiptuk weketutal:

- Amskwesewey tlui'tasitew FILING OF ORDERS - Ula nekmowey tlueketew ankmayiw wen nas-wi'kuksin kampiu'triktuk aqq wikasitew ta'n telawtik miamuj apankitk aqq maliaptitaqq lukowinu'k ta'n naspultijik teluisik piley DIRECTOR OF MAINTENANCE ENFORCEMENT. Ula nkutukwayiw tla'sitew mu e'pit aqq ji'nm kisa'mati'kw tmk pilua'tunew koqoey.

- Ta'puewey tlui'tasitew RESPONSIBILITY TO ENFORCE WITH GOVERNMENT - Ma' l'te'muat ta'n wen ankweiwaji mijua'ji'jk naji-ntutman suliewey katu aunaqa iknmuksin DIRECTOR OF MAINTENANCE ENFORCEMENT naji-ntutmalsewan.

- Si'stewey tlui'tasitew REDUCTION OF DELAYS - Ula nekmowey tlueketew mu awsami-pkije'ktn wen mesnik suliewey ta'n telsutasik msnmn. Ma' nuta'nukw il-lien app court naji-msiman ta'n wenl mu kitu'- apankitmlikul. Director tlueketew ankmayiw ajine'mn suliewey.

- Ne'wewey tlui'tasitew COURT APPLICATION FOR CHANGED FINANCIAL SITUATION - Ula nekmowey tlueketew pela'toq wen ta'n telsutasik apankitmn jiptueke'l tela'lij naji-tkelawtik mesnik kisna entoq wtlukwaqn na miamuj mimajuinu lietew court aqq wjikesitew naji-tkelawtin kisi-apankitmn.

Kmisn ketui-e'waji ki's etl-lukutiliji lukowinu'k lukwatmnew ta'n tli-nqasi-ntutmalsewaten wen ke'sk mu mo'qi-ksika'tuenukw. Kmisn menuekej piley teplutaqn ta'n wji'sitew teluisik DIRECTOR OF MAINTENANCE ENFORCEMENT ta'n nkutukwayiw ntutmalsewata mimajuinu'k. E'pit aqq ji'nm ta'n kisa'matijik ke'sk mna'q courtiktuk ela'ti'kw ta'n tlawtitew suliewey wikma'jl apankitakutal kisi-nas-wi'kusitew Directoral wta'fismk kulaman kisi-ntutmalsewkutal elmiaq pela'tulij. Ne'wt nas-wi'kut wen na ankmayiw tli-wsua'tasitew staqe kis-tlsumujel aqq kisi-mlki-ntutmuaten.

Mimajuinu'k ta'n kisi-ilsumujik keknuawtik apankituanew wikma'jua kisi-mn-wi'kusitaqq ula piley pro'kra'm kitk tl-wl'te'tmi'tij. Kmisn etawej apoqnmasuti ketloqo klu'lktn wen kisi-mn-wi'kusin ula pro'kra'm tlia' kitk e'pit aqq ji'nm teli-mnueke'tij.

Kmisn teli-ktlamsitk ksi-nuta'n mlki-ntutmuksinew mimajuinu'k ta'n kisi-ilsmujik apankituanew wikma'jua teli-pkije'k Nopa Sko'siaewaq keska'takwi'tij. Kulaman kmisnaq kis-wi'kitaqq mawi-wtejkewey reportmuow wjit kapment Nopa Sko'sia etauti'tij wskwijinu'k wsku'tmnew aqq l'kitmnew wi'katiknn teluek ta'n telite'tmi'tij.

Wi'katikn wen kisi-l'kitmuatew Anne Jackmanal, 8th Floor, Garrison Place, 1526 Dresden Row, Halifax, Nova Scotia, B3J 2K2.

A DISCUSSION PAPER

ENFORCEMENT OF MAINTENANCE OBLIGATIONS

Law Reform Commission of Nova Scotia
July 1992

ENFORCEMENT OF MAINTENANCE OBLIGATIONS

A DISCUSSION PAPER

This Discussion Paper is not a final Report of the Law Reform Commission of Nova Scotia. It is designed to promote discussion and public participation in the work of the Commission. It does not represent the final views of the Commission. The Commission invites criticism and comments on the issues raised in this Paper. Submissions should be made in writing and forwarded by September 15, 1992. All comments should be directed to:

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The Law Reform Commission of Nova Scotia was established by the government of Nova Scotia under the *Law Reform Commission Act*, in February, 1991.

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Invitation to Comment

With its first Discussion Paper the Law Reform Commission of Nova Scotia wishes to start the practise of inviting criticism and comment to proposed recommendations on the various legal issues it is studying. This process will be concluded before the Commission makes a formal Report to the Attorney General and government of Nova Scotia in the hope that as many persons, groups or organizations interested in or affected by the law it is reviewing will have an opportunity to participate. It is for this reason that the Commission is releasing this Discussion Paper, **Enforcement of Maintenance Obligations**, which contains 27 suggestions for change.

The Commission has attempted, as much as possible, to describe the legal system and the law it is reviewing in a way that can be understood by people who may not be familiar with legal language. This Discussion Paper presents the Commission's views to date on the enforcement of the legal obligation to pay maintenance. These have been developed by considering the ways in which other provinces and territories deal with this issue and by consulting with members of a resource group, each of whom work within our legal system. The views will be further developed in light of the submissions received. In this way, the Commission will benefit from the experiences and knowledge of other Nova Scotians before completing its Final Report.

It would greatly assist the Commission if people wishing to make comments refer to the specific recommendation and page number in the booklet. All written submissions should be received by September 15, 1992.

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LAW REFORM COMMISSION OF NOVA SCOTIA

DISCUSSION PAPER ON THE ENFORCEMENT OF MAINTENANCE OBLIGATIONS

SUMMARY

In this Discussion Paper the Law Reform Commission of Nova Scotia considers the legal and social policy issues associated with the problem of enforcing legal obligations to pay family maintenance. There is little reliable statistical information available in Nova Scotia concerning the extent to which people do not pay for the support of their ex-partners or children or about the reasons why some people do not pay, even when required to do so by law.

From the information available to the Commission it appears that many Nova Scotian maintenance recipients have problems in ensuring that they receive the money necessary to support themselves or their children. Aside from the personal difficulties between the adult family members that may contribute to this problem, other problems arise from the legal process needed to collect payments. Because the government of Nova Scotia may be required to make up these payments through Public Assistance to ensure that rent and food are available, this means that all Nova Scotia taxpayers contribute to the costs which arise from this problem.

The Discussion Paper contains 27 proposed recommendations for reform which the Commission is considering. The main objectives of the Commission's suggestions are:

- Filing of Orders - to ensure that all maintenance orders made by any court in the province are automatically filed and enforced through a government office (the proposed Director of Maintenance Enforcement). This would happen unless both parties to the order agree otherwise.

- Responsibility to enforce with government - to remove the responsibility and cost of enforcing a maintenance obligation from the person who should be receiving the money and to place it upon the Director's Office (either a court order to pay maintenance or a maintenance agreement written by the people involved);

- Reduction of delays - to reduce delays in the enforcement process by providing the Director with exclusive authority to take action to enforce these maintenance obligations without the necessity of a further court hearing; and

- Court application for changed financial situation - to ensure that if payment is missed or delayed due to changed financial circumstances (eg. loss of a job) that the person whose situation has changed be responsible for applying to court to have the original amount of payment changed.

The Commission wishes to utilize existing personnel where possible and to develop procedures for enforcement which are quick, effective and cost-efficient. The Commission is suggesting a new law to create the office of Director of Maintenance Enforcement which would automatically enforce all court-ordered maintenance. Individuals who have agreements for maintenance which are not court orders would have the ability to register the agreement with the Director's office for enforcement. Once registered, an agreement would be considered a court order for the purposes of enforcement.

Individuals with court orders for maintenance who wish to be excluded from the new enforcement program would be entitled to do so if both parties to the order agree. The Commission is seeking public input on a number of social policy issues such as whether it is inappropriate, in some situations, to prevent individuals from "opting out" of the program.

The Commission believes that better enforcement of maintenance obligations is an important issue which is of interest to all Nova Scotians. **In order to help the Commission prepare its Final Report to the government of Nova Scotia, comments, views and advice from the public on the proposals set out in the Discussion Paper are invited.**

I INTRODUCTION

NATURE OF THE PROBLEM

Each year in Nova Scotia hundreds of orders for maintenance are made by Nova Scotia courts and countless maintenance agreements are negotiated between individuals.[1] Regrettably, many people fail to meet their legal financial responsibility to their ex-partners and children. The effect of non-payment or sporadic and late payment of maintenance orders is that the recipient is forced to spend a great deal of time and money attempting to collect the maintenance payments which have not been made (called "arrears") through the court system. Financial costs arise in terms of lawyers' fees and time away from jobs or child care. The emotional cost is often high in terms of feelings of frustration, anger and a sense of lowered self-esteem.

There is also a cost to the Nova Scotia taxpayers when valuable court time is spent on default hearings and when recipients are forced to rely on provincial Family Benefits or Municipal Social Assistance as a result of maintenance payments not being made. On a broader scale, the reaction of both defaulters and recipients to the inadequacy of maintenance enforcement brings the administration of justice into disrepute when it is perceived that these orders and agreements are often unenforceable. Most significant, however, is the cost to the children in these families who may go without sufficient food, clothing and other necessities of life because of missed or delayed maintenance payments.

In Nova Scotia in 1990/1991 approximately 11,912 active maintenance orders were being enforced through Family Court in the province. Although the amount of money which the court was unable to collect is unknown, it is known that 6,798 default summonses were issued by the Family Court to bring defaulters to court to explain why maintenance payments had not been made. More reliable statistics on the rate of default in the payment of maintenance are not available in Nova Scotia. Even for the orders which require payment through court (and many do not) there are no accurate statistics as to the rate of default or the reasons for default. The Commission is of the opinion that research studies should be conducted to examine the nature of the problem. It also believes, however, that the information available at present suggests that improvement to the system should be made now and need not await further costly statistical studies. In the Commission's opinion, it is reasonable to conclude that default of maintenance is a problem in Nova Scotia as it is in most other places in Canada.

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[1] For a discussion of how a person obtains a maintenance order in Nova Scotia see Part II - Availability of Maintenance.

There may be many reasons why a person defaults on a maintenance order, one of which may be that he or she can no longer afford to pay the amount of the order due to a change in financial circumstances. The reality of the present economic climate in Nova Scotia is such that many people are losing jobs or obtaining an inadequate level of seasonal employment. A new enforcement system will not seek to extract money from individuals who do not have the money to pay. Neither will a new system of enforcement address the various and numerous poverty issues which affect many Nova Scotians and require them to turn to Social Assistance or Public Benefits. If a change in financial circumstances is the real reason for default, the right of the defaulter to apply to court to change or vary the original amount in the order should not be affected.

There is evidence to suggest that many individuals who default on maintenance payments do so not because they are unable to pay but because they refuse to pay[2]. It is these individuals who must be dealt with so that they will honour their legal obligations to their families in a timely and cost-efficient manner. It is the view of the Commission that these debts must be treated in the same manner as other types of debts. However, because of the unique nature of the public interest in the payment of maintenance, we believe that a government-funded collection process is justified.

The problem of maintenance enforcement is not a simple one. The difficulties may not be completely resolved by any one method of enforcement. Also, it is clear that any proposals for reform will not improve the efficiency of the system unless there is a commitment of financial resources to operate the program. Maintenance enforcement requires a sufficient number of trained staff members to operate the Enforcement Offices throughout the province. The Commission believes that any initial expenditure in establishing a new maintenance enforcement program will be substantially offset by savings to the Family Benefits program.

In this Paper the Commission describes an automatic maintenance enforcement system it is considering. The main purpose of this system is to remove the responsibility for enforcing maintenance orders from the recipients and place it on a public office (the Director of Maintenance Enforcement). This will create an impartial third party who will have responsibility for ensuring that payments are up to date without the additional involvement of either the recipients or the courts and without cost to the recipient. The Commission is seeking public comment about whether this is the best way to improve maintenance enforcement.

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[2] Canadian Institute for Research and Steering Committee: *Matrimonial Support failures: Reasons, Profiles and Perceptions of Individuals Involved*, Volume 1, Summary Report, Calgary, Alberta, page 2.

TERMINOLOGY

The law uses many different terms to define the financial support owed to a spouse, ex-spouse or child during or after a relationship. The law speaks of "alimony", "maintenance" and "support". For the purposes of this paper, the word "maintenance" will be used to describe all of these financial obligations. This paper is concerned with the enforcement of maintenance orders for both spousal and child support but does not deal with orders which provide maintenance to a parent who may be financially dependent upon his or her children.

"Recipient" refers to a person who should be receiving maintenance according to a maintenance order or a maintenance agreement.

"Payor" refers to a person who is obliged to pay maintenance according to a maintenance order or a maintenance agreement.

"Maintenance debtor" refers to a person who owes maintenance to another according to a maintenance order or a maintenance agreement but who has not paid.

"Maintenance creditor" refers to a the person who should be receiving maintenance according to a maintenance order or a maintenance agreement but who has not received it.

"Variation" refers to an application which is made to a court to change or vary the amount of money to be paid as maintenance. The application may be started by either the recipient or payor. The person who applied must prove that there has been a change in the financial situation that justifies the suggested change.

DISCUSSION PAPER

This Discussion Paper examines the present law in Nova Scotia relating to maintenance enforcement in Part II. Part III examines the problems inherent in the present system and the need for reform while Part IV considers specific aspects of the proposed automatic enforcement system. Part V contains a summary of the suggestions of the Commission.

II MAINTENANCE ENFORCEMENT IN NOVA SCOTIA

AVAILABILITY OF MAINTENANCE

Maintenance for a child or a spouse is available in Nova Scotia in a number of ways. The *Divorce Act*[3], which is a federal law, provides that a person can be granted a maintenance order by the Supreme Court of Nova Scotia. Alternatively, the *Family Maintenance Act*[4], which is a provincial law, authorizes a judge of the Family Court of Nova Scotia to grant maintenance. Additionally, parties may reach their own agreement on maintenance and when the agreement is registered with the court the agreement becomes a court order for maintenance and may be enforced as if it were court-ordered.

As a result of this divided system of family law, in Nova Scotia the remedies available for enforcing the maintenance order may depend upon which court granted the order. Some remedies are available in Supreme Court only. Family Court remedies, on the other hand, are available for Supreme Court orders or private agreements that have been registered with the Family Court.

EXISTING SYSTEMS OF ENFORCEMENT

1. General

A number of federal remedies are available to enforce a maintenance order in Nova Scotia but since the Law Reform Commission makes recommendations to the provincial government only, these federal remedies will not be considered in this Paper.[5]

In Nova Scotia, most remedies available to enforce a maintenance order are the same as those which other persons who are owed money must seek (eg. seizure and sale of assets, garnishment of wages, etc.) but additional remedies are available only to maintenance

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[3] S.C. 1967-68, c. 24; now R.S.C. 1970, c. D-8. See detailed discussion at pp. 8/9.

[4] R.S.N.S. 1989, c. 160. See detailed discussion at pp. 8/9.

[5] The "federal" remedies include: tracing federal information banks to find defaulters and the attachment or garnishment of federal monies such as Unemployment Insurance and Canada Pension benefits under the *Federal Orders and Agreements Enforcement Assistance Act*; the attachment of the salaries of federal civil servants under the *Garnishment, Attachment and Pension Diversion Act;* and the garnishment of the salaries of armed forces personnel under the *National Defence Act* or the armed personnel's pension under the *Canadian Armed Forces Superannuation Act*.

creditors. These include default hearings, Family Court security orders, receivership and imprisonment.

2. Default Hearings

When an individual who is required to pay maintenance fails to make the payment, the usual procedure in Family Court is that he or she will be summoned to appear in court to explain to a judge the reasons for the failure to pay. The hearing during which the explanation is heard is called a default hearing, or a show cause hearing.

If the judge finds that the maintenance debtor did not have a reasonable excuse for the default, the judge may:

- issue what is called an "execution order", an order to enforce the judgment usually by seizing and selling the assets of the debtor;
- enter a judgment for the outstanding amount; that is, order that the maintenance debtor owes a certain amount of money which can be enforced; or
- issue a warrant for imprisonment for a period of time not greater than three months.

The judge also has the power to cancel or reduce the outstanding arrears where it appears to be in the best interests of the parties and their dependant children. For a Supreme Court order, however, the Family Court judge may only make a recommendation to Supreme Court to have the arrears forgiven since the Family Court does not have jurisdiction to amend orders of the Supreme Court.

The default process is frequently a time-consuming one, with significant delays between the time a summons to appear is issued and the date of hearing.

3. Execution Orders

Perhaps the most useful remedy available to enforce any judgment is that of garnishment or seizure of assets (usually wages). This is done through the use of an execution order. It may not always be a satisfactory remedy for a maintenance recipient, however, since the defaulter may not have wages or assets to be seized, or assets may be registered in the name of a third person.

To enforce an order according to the Civil Procedure Rules of Nova Scotia, the maintenance order must be made by the Supreme Court of Nova Scotia. Under the *Divorce Act*, people involved in a divorce can ask the court for additional orders for custody, access or maintenance of a spouse or child. These orders are part of what is called the "corollary relief judgment." A corollary relief judgment in a divorce is an order of the Supreme Court, and an execution order is available as a means of enforcing the maintenance order which is in

default. The maintenance creditor is required to file a sworn statement, or affidavit, with the court outlining the details of the default. The affidavit, together with other documents, are filed with the Supreme Court. The execution order is then forwarded to the sheriff's office along with any available information relevant to the maintenance debtor's financial circumstances (i.e. address, phone number, marital status, number of dependants, employer, salary or wages, bank account, ownership of property, etc.).

An execution order may also be issued by the Family Court for the orders or agreements which it has jurisdiction to enforce. A Family Court execution order has priority over all other execution orders except ones issued by the Supreme Court with respect to maintenance.

Once a person has obtained an execution order, a number of options are available to collect on the debt including the seizure of tangible personal property, bank accounts, rental income, and third party payments which most frequently take the form of salaries from employers. It often takes several months in some jurisdictions for a sheriff to seize a debtor's assets and sell them.

In Supreme Court, garnishment of wages is limited to 15% of a person income but, if the order pertains to maintenance, an application may be made to court to have the amount increased. In Family Court, however, a garnishee order may be issued in the amount equal to 125% of the maintenance order if the order is already in arrears. Thus, for example if a person has not paid a $100 a month maintenance order for three months and now owes $300, a garnishment order can be issued from the Family Court in the amount of $125 per month, which is 125% of the maintenance order. This allows the court to collect the monthly sum plus 25% towards payment of the arrears.

4. Registration Against Land

Once an order for payment of money is obtained in the Supreme Court (including an order for the payment of maintenance), a certificate of judgment for the order can also be obtained. A certificate of judgment is the legal document which proves that the judgment exists. Alternatively, if the order has been issued by the Family Court, it has jurisdiction to grant a judgment for the amount of the outstanding arrears. These judgments can be registered in the Registry of Deeds for any district where the maintenance debtor owns land. This effectively prevents the maintenance debtor from selling or mortgaging the property without satisfying the debt.

The likelihood that the maintenance debtor's interest in the land will be mortgaged, or registered in someone else's name makes this remedy an ineffective one.

5. Family Court Security Order

A Family Court judge may make an order for security to be paid by the payor into Family Court at the time of an original maintenance application. A security order can also be granted

at a later default hearing. The order may state that upon default of payment of maintenance, the property shall be sold to secure payment. The order may then be registered at the office of the Registrar of Deeds.

Application may later be made to the court for sale of the security should a default occur. From the information available to the Commission, this particular remedy appears to rarely be ordered by most judges of the Family Court.

6. Receivership

One of the options available for a Supreme Court maintenance creditor who has exhausted all other remedies is to place the maintenance debtor into receivership under Civil Procedure Rule 52.01(1)(b) and appoint the maintenance creditor as receiver of the salary.

A Supreme Court receivership order can allow the maintenance creditor to intervene for third party payments when the maintenance debtor is self-employed. This process is a long and expensive one which will be granted reluctantly due to the extreme nature of the remedy, but it is an extremely useful remedy in some circumstances.

7. Imprisonment/Contempt

Wilfully disobeying a court order to pay maintenance can result in imprisonment for a maintenance defaulter. A Family Court judge may use imprisonment as a means of enforcing Family Court orders or the agreements or orders registered with the Family Court. In other words, as long as the order or agreement is registered, a Family Court judge has authority to order imprisonment to enforce it.

The law is clear that a maintenance debtor must be given an opportunity to show a valid reason for his or her inability to pay before imprisonment.

From the information available to the Commission it appears that the attitude of Family Court judges in Nova Scotia about imprisonment for failure to pay maintenance varies greatly from one county to another and even from one court room to another.

If a Supreme Court order for maintenance has not been honoured, the maintenance creditor can apply to the court for a contempt order. Contempt is a wilful disobedience of a court order which is punishable by fine or imprisonment or both. The maintenance creditor must apply to the Nova Scotia Supreme Court to have a contempt order issued against the maintenance debtor.

The court must be satisfied that the maintenance debtor intentionally failed to comply with the support order. The process itself is somewhat time consuming given that two court appearances are required. If the maintenance creditor is successful, the court may make an order for contempt which orders imprisonment upon failure to comply with certain terms (for example, payment of the arrears within a certain period of time) or it may simply order imprisonment. The order may also direct the maintenance debtor to pay a fine, or to provide money which is lost if he or she does not maintain good behaviour, or to pay legal costs and expenses. Additionally, it may direct the sheriff to take possession of the property of the maintenance debtor or to collect rents, profits or income until he or she complies with the terms of the order.

III PROBLEMS IN THE PRESENT ENFORCEMENT SYSTEM

INTRODUCTION

Traditionally, the remedies available to people who were owed money were designed for the collection of a single, non-recurring debt which was usually a consumer or business debt. Maintenance, however, is an ongoing obligation with serious consequences if there is non-payment or late payment. Because of the damaging effect on families who do not receive their maintenance payments, a new enforcement system is required to ensure people pay when they are obliged by law to do so.

Despite the number of remedies available to people who are owed maintenance, it is the Commission's opinion that the present system of enforcement does not work as well as it should. Part III examines a number of the problems associated with the present maintenance enforcement process in Nova Scotia, including jurisdictional problems, and specific issues such as delay, the discretionary nature of the enforcement remedies and too few enforcement staff.

JURISDICTIONAL CONFLICTS

1. Unified Family Court

One of the most confusing aspects of family law for most Nova Scotians is the division of constitutional powers between federal and provincial jurisdictions which gives different courts authority to decide different family law matters.

The *Constitution Act* [6], sets out how Canadian legislative powers are distributed between the federal government and the provinces. The federal government has been given the power to make laws in relation to "marriage and divorce" (eg. *Divorce Act*[7]) while the provinces have power to make laws in relation to "property and civil rights within the province" (eg. *Family Maintenance Act*[8]) as well as the power to make laws in relation to the "solemnization of marriage in the province".

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[6] 1967, (U.K.) 30 & 31 Vict., c. 3.

[7] S.C. 1967-68, c. 24; now R.S.C. 1970, c. D-8.

[8] R.S.N.S. 1989, c. 160.

Provincial maintenance laws apply to these situations:

(1) a couple was married and later separated but did not divorce;
(2) a couple was married and the marriage has been annulled[9]; or
(3) a couple was never married but where a need for the support of either person or their children has been shown.

Once a divorce has been started, however, provincial maintenance laws are no longer involved and only the federal law applies.

As a result, an individual can receive a divorce from the Supreme Court of Nova Scotia with a division of marital property, custody of children, and maintenance obligations granted under the *Divorce Act*. He or she can alternatively settle custody and maintenance matters in Family Court but the Family Court judge cannot deal with the division of marital property. The situation is even more confusing for unmarried or "common law" spouses who can be awarded maintenance only in Family Court . If the couple wants a division of property they are forced to go to Supreme Court.[10]

The Commission does not wish to re-address the numerous problems associated with this fragmentation or division of jurisdiction which was already reviewed by the Nova Scotia Court Structure Task Force[11], but the Commission does wish to support the conclusion of the Task Force with respect to a Unified Family Court.

The Commission suggests:

(1) a Unified Family Court be created to serve all the province with all of the powers now available in Supreme Court;

2. Automatic Maintenance Enforcement Legislation

The Commission believes that although the problem of maintenance enforcement may be simplified by a Unified Family Court, reform of the present enforcement process need not await court restructuring which may take several more years.

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[9] An annulled marriage is one which has been declared void. This legal concept differs from a divorce since a divorce ends the legal marriage while an annulment says the marriage never legally existed in the fist place.

[10] Although the *Matrimonial Property Act* does not apply to unmarried couples, either party may ask the Supreme Court to declare that a trust situation has evolved between the parties which warrants a division of the property of the couple.

[11] *Report of the Nova Scotia Court Structure Task Force* (Nova Scotia, March, 1991).

At present, each Family Court in the province has an Enforcement Office which has responsibility for enforcing Family Court orders for maintenance which are paid through court. These Offices do not actively enforce orders where money is paid directly to the recipient. These offices also enforce Supreme Court orders which have been registered for enforcement. Agreements for maintenance which are registered are also enforced through this office. Thus, the present system of enforcement within the Family Courts is essentially a system where individuals can choose to enforce an order or agreement through the court enforcement office, but such enforcement is not mandatory.

One of the ways in which the jurisdictional problems discussed above may be resolved with respect to maintenance enforcement is to create, by law, a maintenance enforcement office which is separate from the Family and Supreme Courts to enforce the maintenance orders of both Courts. In order to give the Enforcement Office this power, a new maintenance enforcement statute is required which will include all remedies for enforcing maintenance obligations. In this way, all of the enforcement remedies discussed in Part II would be available to the Enforcement Office.

The Commission is of the opinion that an Office of Director of Maintenance Enforcement should be created giving the Director the power to delegate enforcement authority to staff members. Of necessity, the *Family Maintenance Act* would have to be amended to remove the maintenance enforcement sections which would be replaced by the new legislation.

The Commission suggests:

(2) a Maintenance Enforcement statute be passed which will create a Maintenance Enforcement Office to provide automatic maintenance enforcement for all court-ordered maintenance;

(3) an Office of Director of Maintenance Enforcement be established to assume responsibility for the enforcement of all court-ordered maintenance in the province;

SPECIFIC ENFORCEMENT PROBLEMS

1. Delay

The major problem with the present system of enforcement in Family Court is the delays which are caused by repeated court appearances and unnecessary default hearings. Several family law lawyers told the Commission that the enforcement system in Family Court often takes 4-6 months in order to collect on a default of payment.

The procedure in Family Court is that once a maintenance payment is missed, a default summons is issued. This often takes 3-4 weeks after a payment is missed. The defaulter will be required to appear in court approximately 4-6 weeks after the summons is sent. This date may be adjourned for another 4-6 weeks if the defaulter shows up in court seeking an opportunity to hire a lawyer. When the default hearing finally occurs, as late as three or four months after the first non-payment, the hearing may be adjourned for yet another date if the defaulter wishes to attempt to change the amount of the original order. Even if the default hearing goes ahead without any adjournments, the defaulter may simply promise to pay and the whole cycle may begin again the following month if payment is not made.

Some Family Court Enforcement Offices send out a reminder letter to the defaulter before sending a summons. This can lead to further delays if payment is not made and a summons is needed to bring the defaulter to court. This problem of delay varies from one area of Nova Scotia to another and some courts appear to have a busier schedule than others. Clearly, however, every enforcement office in the province would be more effective if the process worked more quickly.

The Commission believes that enforcement could be speedier if more power was given to the Enforcement Officers. All Family Court Enforcement Officers are Justices of the Peace with the authority to take sworn statements and hear evidence. These Justices of the Peace (Jps) should have the power to bring defaulters to court to explain why maintenance has not been paid. They should be able to issue garnishments and enforce the orders with the same remedies available to the Director of Maintenance Enforcement.

If the defaulter is attempting to change the amount of money to be paid or trying to have the maintenance arrears forgiven, the case would be sent back to the judge. Or, if the JP believes that imprisonment is the appropriate remedy, the case would go before a judge. If imprisonment is the remedy, a defaulter must be entitled to a hearing to be given a chance to explain why maintenance was not paid. This is necessary in order to protect the personal freedom and liberty of defaulter.[12]

The Commission believes that better use of these enforcement officers will mean savings to the government in terms of time and cost to the court system.

The Commission suggests:

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[12] Warrants of committal for imprisonment have been set aside where their issuance offends Section 7 of the *Charter of Rights* which ensures an individual's right to "life, liberty and security of the person".

The Commission suggests:

(4) Enforcement Officers now working in the Family Courts be made designates of the Director of Maintenance Enforcement with power to hold default hearings and grant all of the enforcement remedies available under the new law with the exception of imprisonment;

2. Discretionary Nature of Remedies

The Commission believes that most of the remedies necessary to effectively enforce maintenance obligations currently exist but are not applied in the same way throughout the province. This inconsistency among Family Courts in the province is likely due to the fact that judges do not receive guidelines or policy directions for maintenance enforcement. Additionally, many judges work alone and do not have the benefit of the experience of their colleagues on the bench since most enforcement decisions are unreported.

The Commission is concerned that this problem of inconsistent enforcement may not be resolved by transferring power to the Director of Maintenance Enforcement and the designated Enforcement Officers since they will also be required to exercise discretion as to which remedy to apply. Clear guidelines must first be in place which ensure that decisions will be consistent and fair. Furthermore, the policies must be explicit so that all persons affected will be able to predict with some degree of reliability the likely outcome of the enforcement procedure. It is only through consistent and dependable enforcement that Nova Scotians will gain confidence in the enforcement program.

The Commission suggests:

(5) clear policy guidelines be written with respect to the appropriate process to be followed by the Director's Office when enforcing maintenance obligations;

3. Too Few Enforcement Staff

The Commission does not wish to appear critical of the enforcement workers in the Family Courts throughout Nova Scotia. It is aware that many of the delays in enforcement are a result of insufficient staff within the various courts. The efficiency of the enforcement program, however, will continue to be a serious concern if insufficient staffing and inadequate funding remain a problem.

The Commission suggests:

(6) the government designate sufficient staff within the Office of Director of Maintenance Enforcement to actively enforce the maintenance obligations filed, and guarantee adequate funding to train the staff of the Director's office to carry out the new enforcement procedures;

IV PROPOSED AUTOMATIC MAINTENANCE ENFORCEMENT SYSTEM

INTRODUCTION

As a result of the continuing problem of enforcing maintenance obligations, most provinces and territories in Canada have adopted automatic, state-initiated maintenance enforcement programs which are computerized. Under such programs, the provincial or territorial government assumes responsibility for enforcing both federal and provincial orders which are registered within its system. Once registered, the maintenance payments are usually made directly to the Enforcement Office which then forwards the money to the recipient. In an automatic enforcement system, when default occurs, the Enforcement Office takes measures to remedy the situation. If the maintenance debtor has left the area, it uses provincial and federal data banks to locate him or her. If the enforcement agency wishes to bring the maintenance debtor to court for a default hearing, the maintenance creditor does not have to initiate the action or hire a lawyer since the agency will normally have crown counsel or representatives to protect the interests of the maintenance creditor.

Before a default hearing, the Enforcement Office files with the court a statement of arrears which sets out the amount owing. This statement is presumed to be correct and there is frequently a legal presumption that the debtor has an ability to pay unless he or she has proven otherwise. If the court concludes at the default hearing that the maintenance debtor did not have a lawful excuse for the default, it may impose a number of penalties ranging from requiring the maintenance debtor to pay the amount owed in instalments, to imprisoning the maintenance debtor for a period of up to ninety days.

In a general way, this is the type of model which the Commission believes would help improve maintenance enforcement in the province. There are, however, differences in approach among the other provinces and territories, and the Commission believes that the following suggestions for reform are best suited to the needs of Nova Scotians.

AUTOMATIC MAINTENANCE ENFORCEMENT

1. For all Court-Ordered Maintenance

One of the concerns of the Commission is that Family Court Enforcement Offices are not used as much as they could be. Any person with a Supreme Court order or a maintenance agreement is entitled to register the order or agreement with the Family Court for automatic enforcement. Once a person chooses to join the enforcement system the Enforcement Officers are required to enforce the maintenance obligation.

In reality, however, the enforcement is not quite automatic. Recipients are still required to be involved in the process because they must give sworn statements as to the payment history and the amount of arrears owing at the beginning of the process. Also, the recipient may be required to attend court for the default hearing. Although some judges do not require the recipient's attendance, it is usually in the recipient's best interest to attend with a lawyer who can cross-examine the defaulter. Cross-examination about the defaulter's financial situation is important since there exists the real possibility that the arrears may be forgiven.

It is not surprising, therefore, that many recipients who consult a lawyer before registering a Supreme Court order with Family Court are advised to enforce through Supreme Court. In the Supreme Court there is no requirement of a hearing or court appearance, and a garnishment can be obtained without notice to the defaulter. The Commission believes that maintenance orders of the Family Court and Supreme Court should be treated equally and that a Supreme Court maintenance order should not have enforcement advantages over Family Court maintenance orders. The solution, however, is not to take away the existing enforcement remedies in Supreme Court but rather to expand the remedies available to Family Court orders.

The Commission is aware that garnishment in Family Court does not in theory require notice to the defaulter or a hearing under Rule 22 of the Family Court Rules. There are, however, problems with the process as it presently exists. First of all, a garnishee order cannot be granted if arrears have accumulated for more than one year. Secondly, the Enforcement Officers need a judge to sign the garnishee order before it is issued, and it is the practice in some courts not to grant the order without a court hearing. As a result, one of the disadvantages for the individual with an order registered in Family Court is that the remedies available to enforce a Family Court maintenance order are not as readily available or accessible as they are in Supreme Court. On the other hand, the remedy of garnishment in Supreme Court is extremely difficult for a person who does not have a lawyer because of the forms and documents which the Supreme Court requires.

As a result, the Commission believes it is desirable to have an enforcement program which equally and automatically enforces all court ordered maintenance regardless of which court issues the order. All court maintenance orders should include a direction that the order be automatically forwarded to the Office of the Director of Maintenance Enforcement.

In order to allow an effective transition from the present system of enforcement to the new program, it is important that individuals who now have maintenance orders from either the Family Court or Supreme Court be given an opportunity to register their orders with the Director's Office for enforcement. This option should be available to either party to the order and should not require the consent of both parties.

The Commission suggests:

(7) all court orders for maintenance contain a direction for the filing of the order with the Director of Maintenance Enforcement for automatic enforcement;

(8) individuals with court orders for maintenance made before the new program began be permitted to file the orders with the Director for enforcement. This may be done without the consent of both parties to the order;

2. The Option to File Maintenance Agreements

In Nova Scotia, the *Family Maintenance Act* allows paternity agreements and separation or co-habitation agreements to be registered with the Family Court for enforcement. The consequence of registration is that the agreement has the same effect as a court order for maintenance and may be enforced as such. This is a common provision in laws which establish a right to maintenance since it encourages individuals to settle their differences without a court hearing while providing them with the protection of the Enforcement Office.

If an ideal enforcement program were established in Nova Scotia, the filing and enforcement of all maintenance obligations (whether by court order or agreement) would be required. All agreements for maintenance negotiated between individuals would then have to be filed with the Director's office. The Commission realizes, however, that many Nova Scotians have agreements for maintenance, both written and unwritten, which remain unregistered. It would be virtually impossible to ensure uniform registration or enforcement of these types of agreements. The staff and financial resources required to seek out and enforce them would be immeasurable.

The Commission therefore proposes that any individual who is party to a maintenance agreement have the option to file the agreement with the Director of Maintenance Enforcement for automatic enforcement. This would not require the consent of both parties and would be at the option of either person.

The Commission suggests:

(9) either party to an agreement for maintenance may file for enforcement with the Director of Maintenance Enforcement. Once filed, the agreement is treated as an order of the court for the purposes of enforcement;

3. Allowing Exclusion by Consent

The Commission has closely examined the issue of whether or not parties to a court order for maintenance should be allowed to exempt themselves from the new system of enforcement. There are many individuals in Nova Scotia who are ordered to pay maintenance by a court and who do so in a timely and regular manner. The Commission believes that the government should not intervene if maintenance is being paid regularly. Aside from the general question of the extent to which the state should interfere in the private lives of its citizens there are also serious cost considerations. It would cost the government a significant amount of money to regulate the payment of maintenance in circumstances where there are no collection problems. As a result, the Commission proposes that individuals be allowed to "opt out" of the maintenance program, but only if **both** parties to the order consent in writing.

The requirement of both parties' consent is designed to protect the interests of the recipients. If the program allowed one party to opt out, a maintenance defaulter could opt out and the recipient would have no recourse within the program.

Some would argue that an opting out provision will place a great deal of stress on recipients since most payors will not want to be involved in the enforcement program. For recipients who have been involved in a problematic relationship (either physically or emotionally abusive, or financially controlled) this source of pressure could be tremendous. The Commission is aware of these potential problems and suggests that the judge may forbid opting out at the time the order is made if, in his or her opinion, it would be in the best interests of those affected by the order.

The Commission is also aware that a recipient may not initially expect any potential payment problems and will opt out of the program but may later have trouble collecting the money. To deal with this problem the Commission proposes that an individual to an order who has opted out of the enforcement program may later "opt in" without the consent of the other person. This makes the program an available alternative as soon as the order is filed with the Director's office.

The Commission suggests:

(10) parties to a court order for the payment of maintenance be permitted to "opt out" of the program if a written consent is signed by both parties;

(11) the court granting the original maintenance order will have discretion to prohibit opting out, if it is in the best interests of those affected by the order;

(12) even if the parties to the maintenance order originally opted out of the enforcement program, either party will have the right to re-file a maintenance order at any time;

4. Define "Maintenance Order"

An order or agreement for maintenance usually provides for the periodic payment of a certain amount of money (monthly, bi-monthly or weekly). Some provinces and territories, however, have defined maintenance or support much more broadly so that it includes such things as property transfers, exclusive possession of the home and even life insurance beneficiary designation.

The Commission is of the opinion that although the vast majority of maintenance orders which will be enforced by the Director's Office will be for the periodic payment of money, there will be orders and agreements for other types of maintenance which the Director should have the authority to enforce. The Commission recommends, therefore, that a broad definition of maintenance be drafted for the new legislation to include lump sum payments, property transfers, orders dealing with the matrimonial home, pre-natal expenses, designation of beneficiary status under a life insurance policy and legal costs. The Director must be given authority to enforce all of these types of maintenance orders.

Although the Office of Director of Enforcement will have the authority to enforce all types of maintenance orders, it would be unrealistic to think that the Enforcement Officers would be capable of monitoring orders other than those for periodic support. As a matter of practicality, therefore, it will be up to the recipient to contact the Director's Office if, for example, a property transfer has not occurred on time, to alert the Enforcement Officer to take the necessary action to enforce the order.

The Commission suggests:

(13) a broad definition of "maintenance order" be contained in the new legislation and that the Director of Maintenance Enforcement be given authority to enforce all types of maintenance orders;

5. Maintain Regional Offices

The Commission has examined the issue of whether or not the Enforcement Office should be centrally located or maintained regionally. Although there are some advantages of a central office, the advantages of regional offices are that they are less bureaucratic and more significantly, the Enforcement Officers in smaller, regional offices get to know the clients and the problem files.

The Commission has concluded that it is most desirable, both financially and from a personnel point of view, for the new system to blend with the present enforcement program as much as possible and that the Enforcement Offices in the Family Courts should become the offices of the new Director of Maintenance Enforcement as well. Thus, the Enforcement Offices would remain in the Family Court buildings, but operate as separate offices with the authority to automatically enforce orders of all courts.

The Commission suggests:

(14) the present Family Court Enforcement Offices be converted to regional offices of the Director of Maintenance Enforcement;

6. Increase Number of Enforcement Staff

As discussed above, the Enforcement Officers currently working in the Family Court Enforcement Offices throughout the province will become designates of the Director of Maintenance Enforcement. It will, however, be necessary to increase the number of enforcement staff in the regional offices to cope with the increased number of orders and agreements which will be enforced. The Director's office will also require lawyers to act on its behalf and it may be able to use existing legal aid lawyers or Crown Attorneys, depending upon availability in the county.

It is hoped that by moving the task of enforcement away from the court system there will be less need for lawyers. Lawyers will, however, be required to work on complicated enforcement matters and issues on appeal before the court.

The Commission suggests:

(15) the Director of Maintenance Enforcement hire lawyers to litigate matters, where necessary, on behalf of maintenance recipients;

SPECIFIC ENFORCEMENT ISSUES

1. First Default Principle

(a) General

There is currently a great deal of public interest generated by the concept of what is commonly called automatic income attachment or automatic garnishment of wages. This is currently in place in Ontario [13] and provides that when a court makes an order for maintenance for regular periodic payments, it must also make what is called a support deduction order. This order requires an employer, or other income source, to deduct support payments from a payor's regular income and send them to the Family Support Plan (formerly the Director's Office) each pay day. In others words, a payor does not have to default on an order before the garnishment occurs, it is designed to start right from the start, before problems happen.

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[13] On June 13, 1991, Bill 17 (Chapter 5 Statutes of Ontario, 199') *An Act to Amend the Law Related to the Enforcement of Support and Custody Orders* received Royal Assent.

The system is the same for everyone unless the court agrees to let the parties "opt out" and grants what is called a suspension order. In order to opt out, however, the parties must be in agreement and the payor must deposit security equivalent to at least four months of support payments with the Family Support Plan. If the payor later defaults on payment the suspension order is cancelled, the security is used to make up the missed payment(s) and the deduction order automatically comes into effect (ie. the payor's wages are attached).

The Commission realizes that while this type of system has certain advantages, it has a number of concerns about the Ontario approach. First of all, the program may increase the bureaucracy of maintenance enforcement by requiring wage garnishment even in cases where there may never be payment problems. In those cases it is an unnecessary expense for both the employers and the government office which must regulate the process. Secondly, it does not give the payor an opportunity to demonstrate a good payment history before it garnishees income. Most importantly, however, it allows only those individuals who can afford to post four months security to opt out. The reality is that only individuals who are financially well off will be allowed to opt out of the program. The Commission believes that this policy gives an unfair advantage to individuals with higher incomes or economic standing. For many individuals it would be difficult to deposit security for even one month yet he or she may be the type of person who would pay on a regular basis.

As a result, the Commission has concluded that an individual should be given an opportunity to make regular payments. If, however, there is one missed payment, the Enforcement Officers will be required to issue a garnishment automatically without a court hearing and without an opportunity for the defaulter to explain the default. The garnishment will be of wages or any other available income source. This "first default" program will give payors an opportunity to demonstrate a willingness to pay, while providing recipients with the knowledge that if a payment is missed, garnishment will be automatic.

The Commission suggests:

(16) if a person misses one maintenance payment a garnishment of any available income will automatically be imposed by the Director of Maintenance Enforcement without a default hearing;

(b) Define "Income Source"

Most often a garnishment is of a salary or wages, but there are other potential sources of income including Unemployment Benefits, Canada Pension Plan Benefits, Revenue Canada Refunds and, most recently, GST (Goods and Services Tax) rebates. The attachment of these sources is currently available under federal law.[14]There are also potential sources of income available through commissions, accident and disability benefits, annuities and pension or

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[14] See footnote 5.

retirement income. The Commission is of the opinion that "income source" should be defined as broadly as possible to ensure that the Director of Maintenance Enforcement can attach all possible sources of income.

If the new legislation broadly defines income source, two other provincial laws will require amendments. If income source includes a benefit under an accident, disability or sickness plan, the *Workers' Compensation Act*[15] will have to be amended to explicitly allow attachment of these benefits. It is the Commission's understanding that a number of Family Court judges in the province have been attaching these benefits and the Workers' Compensation Board has been honouring the orders. The Act should be amended, however, to reflect this practice and to make it mandatory for the Board to forward the money to the Director of Maintenance Enforcement. Since Workers' Compensation benefits reflect lost wages which a person collects while unable to work, this income should be available to maintenance recipients. If a worker receives a drastic reduction in income as a result of receiving only a partial disability while still unable to work, the responsibility is on the worker to apply to court to have the amount of the original maintenance order changed.

Similarly, if income source is defined to include pension and retirement income the *Pension Benefits Act*[16] will also require amendment. The Act currently exempts money payable under a pension plan from attachment and will have to be amended to specifically allow garnishment for maintenance. Although this may on its face appear harsh for pensioners, it should be remembered that the original maintenance order will have considered the means and needs of both the parties, and therefore, there is no reason to distinguish pension income from other types of income. If, in the opinion of the payor, the order is no longer fair, it is the responsibility of the payor to apply to court to attempt to have the amount changed.

The Commission suggests:

(17) "income source" be defined as broadly as possible in the new legislation to include, among other things, salary and wages, commissions, dividends, annuities, accident and disability benefits, and pension or retirement income;

(18) the *Workers' Compensation Act* and the *Pension Benefits Act* be amended to allow garnishment of accident and disability benefits as well as pension or retirement income;

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[15] R.S.N.S. 1989, c.508, s. 23.

[16] R.S.N.S. 1989, 340, s. 71.

(c) Failure to Comply

The Commission recommends that substantial fines be imposed whenever an income source fails to forward money to the Director of Maintenance Enforcement within the specified time. The Commission believes that income sources (in most cases, employers) should be directed to make the deductions from the income of the payors, and that the same consequences apply for failing to do so as apply for Revenue Canada and Canada Pension Plan deductions.

The Commission is also considering the possibility of making the income source responsible for the maintenance obligation if there is failure to make the deduction within the specified time frame. It will reserve its opinion on this measure, however, until it has received public feedback.

The Commission suggests:

(19) substantial fines be ordered against income sources which do not forward maintenance deductions within the specified time as required by the new legislation;

(d) Information Requirements

At the time of filing a maintenance agreement with the Director's Office or at the time a court orders maintenance, the parties will be required to submit financial and employment information to the Director's Office. This will be in the form outlined in the new legislation and there will be penalties for failure to provide the information or for providing information that is false or misleading.

In order to ensure that the new enforcement program works efficiently and quickly, the Commission is of the opinion that both the payor and the income source must be responsible for informing the Director's Office whenever there is a change in employment (including a termination, transfer, lay-off or change in the rate of pay). This means that those who have the information are responsible for keeping the information in the Enforcement Offices up to date. It will also ensure that a garnishment order stops as the payor stops receiving income.

The Commission suggests:

(20) the new legislation contain a requirement for filing financial and employment information with the Director's Office, with penalties for failure to file or for filing information which is false or misleading;

(21) the new legislation require payors and income sources to provide information to the Director's Office whenever there is a change in financial circumstances, with penalties for failing to do so;

2. Powers of Enforcement Officers

(a) General

As discussed above, one of the ways in which the Commission proposes to save time and money within the Enforcement Offices is to provide more authority for enforcing the maintenance obligations with the Enforcement Officers. In this way, the enforcement of maintenance orders will become more automatic and more administrative and will not normally require an appearance before a judge.

(b) Default Hearings

With the mechanisms in place to automatically garnishee the income of a payor who defaults once, there will be a reduced need for the traditional default hearing. There will, however, be circumstances where a defaulter does not have an income source to garnishee. It will then be necessary to bring the defaulter to the Enforcement Office to get additional financial information and to find out why payments have not been made. Where this is required, the Enforcement Officers will have the authority to summons the defaulter to the Enforcement Office and to take evidence from the defaulter under oath. The Enforcement Officer will then decide which enforcement remedy is appropriate.

Under the new enforcement program there will no longer be a need to bring a defaulter before a judge for a default hearing since the Enforcement Officers will be performing this function. If the defaulter does not show up, the Enforcement Officers, who are also Justices of the Peace, will have the authority to issue a warrant for the arrest of the defaulter. The Commission is aware that potential arguments may arise under the Charter of Rights and Freedoms with respect to Enforcement Officers issuing warrants for arrest.

The Commission suggests:

(22) if there are no available sources of income to garnishee that the Enforcement Officer issue a summons to bring the defaulter to the Enforcement Office to obtain additional financial information to enforce the maintenance obligation;

(23) if the defaulter fails to appear after a summons has been sent that the Enforcement Officer issue a warrant for arrest;

(c) Other Remedies

The Enforcement Officer, having had an opportunity to find out why the defaulter has not paid, can find out if there are assets to be seized or any other sources of income which can be garnisheed. If there are assets available, the Enforcement Office will have the authority to issue an execution order to have the assets seized and sold to satisfy the maintenance debt.

The Enforcement Officers will also have authority to use provincial and federal information data banks under the relevant laws to locate defaulters who fail to appear as required.

If the Enforcement Officer is of the opinion that the defaulter is able to pay but is refusing to do so and other enforcement remedies are unsatisfactory, the Enforcement Officer will bring the defaulter before a judge of the Family Court with a recommendation that the individual be imprisoned for a period of up to 90 days. It is the Commission's belief that some individuals are capable of working illegally (that is, without reporting to Revenue Canada) and maintaining all bank accounts and property in the name of another. For these people the threat of a jail term may be the only way to secure payment. Thus, jail will remain an important feature of the enforcement procedure for a limited number of individuals.

The Commission is concerned about the practice of forgiving arrears where a defaulter claims to be unable to pay. This will continue to be a potential problem if the Enforcement Officers are given the same discretion as judges to forgive arrears. As a result, the authority of the Office of Director of Maintenance Enforcement will be for the enforcement of maintenance only. If, in the opinion of the Enforcement Officer, a defaulter is unable to pay, the person must be instructed to apply to the court to vary the amount of the original order or agreement. The Enforcement Officers will not, however, have the authority to dismiss, suspend or forgive arrears or to change the amount of the original order or agreement.

The Commission suggests:

(24) the Enforcement Officers be given authority to grant execution orders for the seizure and sale of assets if there are insufficient income sources available for garnishment;

(25) the Enforcement Officers be given authority to trace defaulters through federal and provincial data banks where necessary;

(26) when no other enforcement remedies are satisfactory and in the opinion of the Enforcement Officer a defaulter has an ability but refuses to pay, that the Enforcement Officer bring the defaulter before a Family Court judge for a hearing which may result in imprisonment;

(27) the authority of the Enforcement Officers be limited to enforcing maintenance obligations and that they will not have the authority to dismiss, cancel or suspend arrears or to change the amount of the original order or agreement.

IV SUMMARY OF PROPOSED RECOMMENDATIONS

The following is a summary of the Commission's suggestions with respect to the proposed reforms to the enforcement of maintenance obligations within the province. The page at which each suggestion is located in the body of the Paper is indicated at the end of each suggestion.

(1) a Unified Family Court be created to serve all the province with all of the powers now available in Supreme Court; **[page 9]**

(2) a Maintenance Enforcement statute be passed which will create a Maintenance Enforcement Office to provide automatic maintenance enforcement for all court-ordered maintenance; **[page 10]**

(3) an Office of Director of Maintenance Enforcement be established to assume responsibility for the enforcement of all court-ordered maintenance in the province; **[page 10]**

(4) Enforcement Officers now working in the Family Courts be made designates of the Director of Maintenance Enforcement with power to hold default hearings and grant all of the enforcement remedies available under the new law with the exception of imprisonment; **[page 12]**

(5) clear policy guidelines be written with respect to the appropriate process to be followed by the Director's Office when enforcing maintenance obligations; **[page 12]**

(6) the government designate sufficient staff within the Office of Director of Maintenance Enforcement to actively enforce the maintenance obligations filed, and guarantee adequate funding to train the staff of the Director's office to carry out the new enforcement procedures; **[page 12]**

(7) all court orders for maintenance contain a direction for the filing of the order with the Director of Maintenance Enforcement for automatic enforcement; **[page 15]**

(8) individuals with court orders for maintenance made before the new program began be permitted to file the orders with the Director for enforcement. This may be done without the consent of both parties to the order; **[page 15]**

(9) either party to an agreement for maintenance may file for enforcement with the Director of Maintenance Enforcement. Once filed, the agreement is treated as an order of the court for the purposes of enforcement; **[page 15]**

(10) parties to a court order for the payment of maintenance be permitted to "opt out" of the program if a written consent is signed by both parties; **[page 16]**

(11) the court granting the original maintenance order will have discretion to prohibit opting out, if it is in the best interests of those affected by the order; **[page 16]**

(12) even if the parties to the maintenance order originally opted out of the enforcement program, either party will have the right to re-file a maintenance order at any time; **[page 16]**

(13) a broad definition of "maintenance order" be contained in the new legislation and that the Director of Maintenance Enforcement be given authority to enforce all types of maintenance orders; **[page 17]**

(14) the present Family Court Enforcement Offices be converted to regional offices of the Director of Maintenance Enforcement; **[page 18]**

(15) the Director of Maintenance Enforcement hire lawyers to litigate matters, where necessary, on behalf of maintenance recipients; **[page 18]**

(16) if a person misses one maintenance payment a garnishment of any available income will automatically be imposed by the Director of Maintenance Enforcement without a default hearing; **[page 19]**

(17) "income source" be defined as broadly as possible in the new legislation to include, among other things, salary and wages, commissions, dividends, annuities, accident and disability benefits, and pension or retirement income; **[page 20]**

(18) the *Workers' Compensation Act* and the *Pension Benefits Act* be amended to allow garnishment of accident and disability benefits as well as pension or retirement income; **[page 20]**

(19) substantial fines be ordered against income sources which do not forward maintenance deductions within the specified time as required by the new legislation; **[page 21]**

(20) the new legislation contain a requirement for filing financial and employment information with the Director's Office, with penalties for failure to file or for filing information which is false or misleading; **[page 21]**

(21) the new legislation require payors and income sources to provide information to the Director's Office whenever there is a change in financial circumstances, with penalties for failing to do so; **[page 22]**

(22) if there are no available sources of income to garnishee that the Enforcement Officer issue a summons to bring the defaulter to the Enforcement Office to obtain additional financial information to enforce the maintenance obligation; **[page 22]**

(23) if the defaulter fails to appear after a summons has been sent that the Enforcement Officer issue a warrant for arrest; **[page 22]**

(24) the Enforcement Officers be given authority to grant execution orders for the seizure and sale of assets if there are insufficient income sources available for garnishment; **[page 23]**

(25) the Enforcement Officers be given authority to trace defaulters through federal and provincial data banks where necessary; **[page 23]**

(26) when no other enforcement remedies are satisfactory and in the opinion of the Enforcement Officer a defaulter has an ability but refuses to pay, that the Enforcement Officer bring the defaulter before a Family Court judge for a hearing which may result in imprisonment; **[page 23]**

(27) the authority of the Enforcement Officers be limited to enforcing maintenance obligations and that they will not have the authority to dismiss, cancel or suspend arrears or to change the amount of the original order or agreement. **[page 23]**